

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 02-13533

5 - - - - -x
6 In the Matter of:

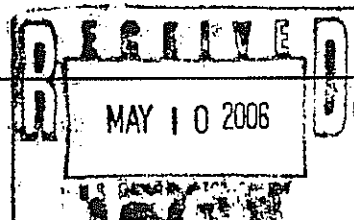
7
8 WORLDCOM, INC., ET AL.,

9
10 Debtor.

11
12 - - - - -x
13
14 U.S. Bankruptcy Court
15 One Bowling Green
16 New York, New York

17
18 April 25, 2006
19 11:09 A.M.

20
21 B E F O R E:
22 HON. ARTHUR J. GONZALEZ
23 U.S. BANKRUPTCY JUDGE
24



1

2

MOTION by Defendant for Summary Judgment.

3

Opposition by Plaintiff Filed.

4

5

MOTION by Debtors for Summary Judgment With

6

Respect to Claims Filed by HSG/ATN, Inc.

7

Opposition by HSG/ATN, Inc. Filed.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Transcribed By: Esther Accardi

25

1 A P P E A R A N C E S :

2

3 MORGENSTERN JACOBS & BLUE, LLC

4 Attorneys for HSG/ATN, Inc.

5 885 Third Avenue

6 New York, New York 10032

7

8 BY: ERIC B. FISHER, ESQ.

9

10 STINSON MORRISON HECKER, LLP

11 Attorneys for MCI

12 1150 18th Street, N.W.

13 Washington, D.C. 20036

14

15 BY: MICHAEL E. TUCCI, ESQ.

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 THE COURT: Please be seated. All
3 right. State your names for the record,
4 please.

5 MR. FISHER: Eric Fisher from
6 Morgenstern Jacobs & Blue, for HSG/ATN, Inc.

7 MR. TUCCI: Michael Tucci on behalf
8 of MCI.

9 THE COURT: This is the debtor's
10 motion, I believe.

11 MR. TUCCI: There are two motions,
12 Your Honor. There's a motion of HSG for
13 summary judgment with respect to the adversary
14 proceeding. There's also the debtor's motion
15 for summary judgment with respect to HSG's
16 claim. We believe both will take,
17 approximately, a half an hour each and that's
18 why they're on the docket for an hour this
19 morning. Counsel had previously conferred and
20 discussed since HSG had filed first that it
21 would go first.

22 THE COURT: All right.

23 MR. FISHER: Good morning, Your
24 Honor. Just one minute of background about
25 HSG. HSG was an agent for WorldCom. They

1 sold WorldCom services and were paid a
2 commission based on revenue that WorldCom
3 earned due to customers that HSG brought to
4 WorldCom. And WorldCom has earned, and
5 continues to earn, substantial revenues post-
6 petition from customers that HSG brought to
7 WorldCom. For example, and this is an exhibit
8 to my declaration, Exhibit E, WorldCom's
9 expert has stated that just in the first half
10 of 2005, WorldCom has earned more than two
11 million dollars from revenue that -- customers
12 that HSG brought to WorldCom. We've been
13 involved in litigation surrounding HSG's claim
14 against WorldCom since, at least, February
15 2003. And yet, somehow, it wasn't until
16 November 11, 2005, that WorldCom brought an
17 adversary proceeding against my client seeking
18 the return of a portion of payments that were
19 made back at the end of 2002. We promptly
20 filed an answer to that new adversary
21 proceeding and then we promptly brought on
22 this motion for summary judgment. The claims
23 in the adversary proceeding are untimely and
24 they're legally deficient for other reasons
25 that I'll try to highlight very briefly.

1 First, in terms of the untimeliness of the
2 claim, the heart of the matter really is
3 WorldCom's claim for a return of approximately
4 455,000 dollars in commissions that were paid
5 to my client in three trounces. The last
6 payment was made on November 12, 2002. They
7 bring this claim under section 549. Under
8 549(d) (1), the applicable statute of
9 limitations for this claim would be two years.
10 So it would have expired in November, 2004.
11 So, that makes that claim approximately one
12 year too late. And I think that the lateness
13 of the claim is compounded by the fact that --
14 perhaps Your Honor will remember, I was not
15 counsel at the time, but my clients initially
16 brought a motion seeking to have their
17 continuing residual commissions recognized as
18 an administrative claim. And there were two
19 days of hearings with regard to that motion.
20 That motion of my clients was denied by Your
21 Honor, they were not entitled to
22 administrative claim priority and my clients
23 never appealed that decision. In connection
24 with Your Honor's decision, you issued an
25 order dated May 11, 2004, and the order, of.

1 course, appears as an exhibit to our papers.
2 And in that order, among other things, Your
3 Honor directed "order that to the extent the
4 debtors seek return of the inadvertent post-
5 petition payments, pursuant to section 549 of
6 the Bankruptcy Code, the debtors are directed
7 to initiate an adversary proceeding pursuant
8 to the Federal Rules of Bankruptcy Procedure."
9 So, nearly six months before the statute of
10 limitations expired, Your Honor directed the
11 debtors to file an adversary proceeding if
12 they wanted these payments back. I think that
13 that makes it all the more compelling that
14 there's just no excuse at all for one year
15 delay. WorldCom's only argument, really, in
16 opposition to our argument that the 549 claim
17 is untimely is that they did raise this issue
18 of the 455,000 dollars in post-petition
19 payments in their objection to our motion for
20 an administrative claim. I think that this
21 argument really fails miserably for a number
22 of reasons. First, they overlooked the fact
23 that Your Honor specifically directed them to
24 commence an adversary proceeding. And so,
25 Your Honor put them on notice that their

1 objection to -- that was contained in their
2 motion was just not enough. There's also no
3 question here that my clients have been
4 prejudiced by this very significant delay. In
5 the record, you will find that we've attached
6 certain correspondence indicating, for
7 example, and I don't believe that WorldCom's
8 counsel will dispute this, the key witnesses
9 here are individuals by the name of Ahern,
10 Hampton, Lako, and Kirk Reynolds. We've been
11 trying to get their documents from WorldCom.
12 WorldCom has had a very difficult time
13 retrieving their files due to the passage of
14 time. In particular, they have not been able
15 to retrieve their electronic files. Most
16 recently, they told us that it would cost
17 approximately 300,000 dollars to retrieve
18 those files and they've told us that they're
19 not going to produce the files unless we share
20 in the costs of getting those files. So,
21 there's no question here that the passage of
22 time has caused evidence to be, essentially,
23 unreachable. It's made the cost of litigation
24 potentially prohibitive. And I think that
25 that highlights why, not only strictly by the

1 terms of the statute is the claim late, but it
2 also would be very unfair to allow this
3 particular adversary proceeding to proceed. I
4 now want to just turn, briefly, to another set
5 of claims that WorldCom asserts in their
6 adversary proceeding. They have claims for
7 tortious interference with WorldCom's
8 contracts. In connection with the claim
9 proceeding, WorldCom contended that my clients
10 solicited certain customers of WorldCom. And
11 Your Honor made certain findings that, in
12 fact, there were a number of instances of
13 solicitation. WorldCom is now suing my client
14 for tortious interference with contract for
15 solicitation that they allege occurred back in
16 2002. As Your Honor will hear when we argue
17 the second motion that is before Your Honor,
18 there is a claim objection proceeding that has
19 been out there for a long time now. At the
20 heart of the claim objection proceeding,
21 WorldCom's objection to our claim is that
22 because we solicited, we've breached the
23 contract. And because we've breached the
24 contract, we have to forfeit all the residual
25 commissions that were otherwise owed. And, I

1 should point out that those residual
2 commissions, according to their expert, are
3 approximately 5.4 million dollars in residual
4 commissions that we're being asked to forfeit.
5 But, in any event, that issue is front and
6 center independent claim objection proceeding.
7 The claim objection proceeding, in effect, is
8 about breach of contract. And what WorldCom
9 is doing here now is they're bootstrapping.
10 This tortious interference with contract
11 claim, it just alleges that we solicited. And
12 so as a result, WorldCom is entitled to
13 damages. Well, that's exactly what's already
14 at issue in the claim objection proceeding.
15 If WorldCom prevails then we lose significant
16 commissions because of alleged breach of
17 contract. And there's well established law
18 that, of course, you cannot bring a tort claim
19 for a claim that is essentially a breach of
20 contract claim.

21 THE COURT: Explain the damage to
22 the relationship. If they breached the
23 contract -- if there was a breach of contract,
24 which is the issue in the claims objection,
25 and then you have to return commissions

1 received. And at the same time that conduct
2 interfered with WorldCom's relationship with
3 customers and therefore they lost -- they
4 could establish damages from that
5 interference, why wouldn't they be cumulative?
6 You seem to be arguing that they're one and
7 the same damage.

8 MR. FISHER: The contract prohibits
9 a certain kind of solicitation by my client.
10 WorldCom alleges that that nonsolicitation
11 provision was breached by my client. The
12 contract then spells out what damages that
13 WorldCom's entitled to in the event of such a
14 breach. When we get to the other motion, I'll
15 tell you why they're not entitled to those
16 damages. But what the contract spells out is
17 the damages that they're entitled to, by the
18 terms of the contract, are commissions that
19 have been earned due to revenue generated by
20 WorldCom. All of those commissions are
21 forfeited. So the contract spells out the
22 damages for breach and that's essentially all
23 they're entitled to and the contract spells
24 out the damages. So that's why I think that
25 these tort claims are entirely duplicative.

1 And I think that, when you consider what's
2 happening here, I think what's really going on
3 here is that this is a case of WorldCom making
4 it very, very difficult for what is a
5 relatively small family business to litigate
6 what I consider to be an extremely valid claim
7 against WorldCom by -- in late 2005 greatly
8 multiplying the litigation in circumstances
9 where we can't even reasonably proceed with
10 discovery. We also -- with respect to the
11 solicitation that forms the basis for
12 WorldCom's tortious interference with contract
13 claim, one of the alleged acts -- there are
14 two alleged acts of solicitation. One of
15 those alleged acts is clearly outside of the
16 statute of limitations for tortious
17 interference with contract. The statute of
18 limitations is three years and the alleged act
19 of solicitation occurred on September 25,
20 2002. So that particular act of solicitation
21 is time barred. WorldCom can't seek to
22 recover for that. Finally, WorldCom also has
23 brought account for a violation of the
24 automatic stay. This is, again, this is all
25 cumulative. What's the violation of the

1 automatic stay, that we allegedly solicited
2 their customers and that their customers were
3 allegedly property of the estate. It's
4 entirely cumulative of a tort claim. But, in
5 any event, there's well established second
6 circuit law that a corporate debtor, such as
7 WorldCom, cannot bring a claim under 362(h).
8 That claim is limited to individuals. So what
9 does WorldCom say in response? They say,
10 well, effectively construe it as a claim for
11 contempt. And the Court, in its equitable
12 powers can hear a contempt claim, but they
13 haven't brought a contempt claim, they haven't
14 amended their complaint to bring a contempt
15 claim. And the reason they haven't is because
16 they know they can't meet threshold for a
17 contempt claim. So, the 362(h) claim for
18 violation of the stay should be dismissed as
19 well. Also on the 362(h) claim, I'm not sure
20 whether Your Honor wants me to get into this,
21 it's briefed in the papers. We also think the
22 362(h) claim fails because the customers were
23 not property of the estate. And if Your Honor
24 wishes, I can go into that. But otherwise,
25 perhaps I should reserve some time for a

1 reply.

2 THE COURT: You can address whatever
3 you need to in reply. The debtor.

4 MR. TUCCI: Thank you, Your Honor.
5 I will briefly address each of the points
6 raised by counsel for HSG. As the Court's
7 fully aware, exact language of section
8 549(d)(1) or (d) in subsection 1 is "an action
9 or proceeding under this section may not be
10 commenced after the earlier of two days." We
11 will admit that an action was not instituted
12 within the two years, however, proceedings
13 were. When HSG filed its claim --

14 THE COURT: Well, what did my order
15 tell you to do?

16 MR. TUCCI: It told us to file an
17 adversary proceeding. That is correct.
18 Which, under the Farmland case, which we have
19 cited to Your Honor, would take the objection
20 coupled with a request for payment. And once
21 the adversary proceeding was filed, the time
22 period or the time with which we would judge
23 whether it was barred or not would be the time
24 that the request was made for the payment.
25 And we believe that the Farmland case is

1 correctly decided and that the time should
2 relate back to the original request, not the
3 date upon which the adversary proceeding was
4 filed.

5 THE COURT: Is there any explanation
6 as to what took you so long to file the
7 adversary proceeding or you just think that's
8 irrelevant?

9 MR. TUCCI: I do not know the answer
10 to that question, Your Honor, why it took that
11 long to file the adversary proceeding. Now,
12 with respect to prejudice, there is absolutely
13 no prejudice. The witnesses that Mr. Fisher
14 speaks of have absolutely nothing to do with
15 the issue related to the post-petition
16 transfer. The monies that are sought to be
17 returned to the estate are funds that were
18 paid post-petition with respect to the claim
19 for continuing commissions. Once Your Honor
20 ruled that they weren't entitled to
21 administrative priority they were a classics
22 claim. That's as a matter of law. These
23 people have absolutely nothing to say about
24 that. That would change the classification of
25 those payments. They were paid 100 cents on

1 the dollar in post-petition monies and they
2 should have been paid, if at all, which we'll
3 get to here in a minute as a classics claim.
4 There is no prejudice. HSG has known since
5 March of 2003, when the objection to the claim
6 for administrative priority was filed, that
7 the debtors sought the return of those funds.
8 With respect to the tort claims, it is useful
9 to actually read what the debtor said in the
10 adversary proceeding. In -- and, by the way,
11 Your Honor, there are three tort claims here,
12 not just one. There is tortious interference
13 with customer contracts, tortious interference
14 with business relationships and tortious
15 interference with agency contracts. In the
16 prayer for relief under each count the debtor
17 stated, "because of HSG's tortious
18 interference, reorganized debtor's request
19 relief for any compensatory damages not
20 remedied under section 8.3 of the agreement."
21 It's not duplicative. It's if there are
22 damages over and above the contractual damages
23 then the tort claim would be used to obtain
24 compensatory damages.

25 THE COURT: What are the rights to

1 get any damages even if you could assert them
2 over and above what the contract provides?

3 MR. TUCCI: Well, that leads me to
4 my next point. The debtor has not asserted
5 any breach of contract claim, there is no
6 breach of contract claim asserted by the
7 debtor. What this is, is a claim by HSG for
8 the residual commissions that's been defended
9 by the debtor with the assertion that a
10 condition to that payment has not been
11 satisfied. It is not an affirmative claim by
12 the debtor that HSG breached the contract.
13 The contract, and I'll be happy to get into
14 this now, but we'll probably get into it in
15 more detail on the debtor's motion, the
16 contract says, "if you engage in this
17 particular type of conduct, you are not
18 entitled to any further residual commission."
19 HSG engaged in that conduct. Therefore,
20 they're not entitled to any further
21 commission, it's a condition. Your Honor even
22 found in the administrative priority decision
23 that this was a condition subsequent which
24 might provide the debtor a defense to payment,
25 that's a paraphrasing of what Your Honor

1 found. It's not a breach of contract claim,
2 we've not made an allegation that it's a
3 breach of contract claim. With respect to the
4 statute of limitations, again, there are three
5 tort claims here. HSG has alleged the statute
6 has run with respect to only one, it's a
7 contact with a customer so it would only apply
8 to one count not all three tort counts, number
9 one. Number two, under New York law, the
10 cause of action does not accrue until the
11 damages have been sustained by the debtor.
12 There's no allegation as to when the damages
13 have been sustained, the burden is on HSG and
14 the motion for summary judgment to establish
15 that there's no genuine issue with respect to
16 any material fact that the cause of action
17 accrued outside the limitations period.
18 Without an allegation of when the damages --
19 that the damages occurred prior to or outside
20 the statute of limitations period, the motion
21 for summary judgment cannot be granted. And
22 finally, with respect to the 362, there again,
23 looking at the actual language of the
24 adversary complaint -- adversary proceeding
25 complaint, 362(h) does not appear anywhere in

1 the count. The claim was not that the debtor
2 was entitled to damages under 362(h), the
3 claim was that because of the willful,
4 malicious and intentional violation of the
5 automatic stay, HSG has been damaged and that
6 the debtors requested relief for any, again,
7 compensatory damages not remedied under
8 section 8.3 of the agreement. It's not a
9 claim under 362(h). Finally, with respect to
10 whether the customers are property of the
11 estate, we've cited, Your Honor, to Judge
12 Brosman's opinion in Alert Holdings which
13 shows, in virtually identical circumstances,
14 that customers in this type of situation where
15 there's a proscription on contacting those
16 customers are property of the estate. And a
17 violation of that proscription can be remedied
18 by the Court as a violation of the automatic
19 stay. We think that the entire motion should
20 be denied for the reasons stated.

21 THE COURT: All right. Thank you.

22 MR. FISHER: Your Honor, if I can
23 briefly reply to those points. Mr. Tucci says
24 that it's not -- the claim is not time barred
25 because there was a proceeding that was

1 commenced within the statute of limitations
2 period, and he's referring to the objection to
3 our motion for administrative claim. None of
4 the cases, including Farmland, that the debtor
5 cite in their paper relate in any way to
6 construing 549(d). They're dealing generally
7 with the meaning of proceeding. And here I
8 think the circumstances are quite unique
9 because Your Honor specifically directed that
10 the proceeding that was pending was just not
11 enough, they had to commence an adversary
12 proceeding. And due to their delay, as I've
13 indicated, there has been substantial
14 prejudice. Now, if Mr. Tucci says there
15 hasn't been prejudice because the documents
16 from these witnesses are not relevant and the
17 witnesses themselves are not relevant, that's
18 absolutely not the case. What we intend to
19 show, and this will perhaps come out more
20 clearly when we argue the second motion, is
21 that what happened here is that WorldCom
22 decided to reject the residual commission
23 obligation in a motion that it brought on
24 January 3, 2003. And up until that point, it
25 did what it was supposed to do, at least

1 through the November 15th payment, which is it
2 honored the contract. And those payments that
3 were made in full were appropriately made to
4 our client. And if WorldCom is now denying
5 that that's what happened then we're entitled
6 to get the decision makers who are
7 specifically -- WorldCom had an internal
8 debate, what should we do, we learned that HSG
9 engaged in this act of solicitation, should we
10 terminate the residual commission obligation,
11 we seem to have that right under the contract,
12 or should we let it go. And they decided to
13 let it go and they didn't reject the contract
14 until January 3, 2003. When we get to the
15 other motion I can explain why I think it is
16 that they decided to do that. But in any
17 event, we're entitled to testimony of the
18 witnesses who were involved in that decision
19 to show that's what really happened. Mr.
20 Tucci says there's no affirmative claims for
21 breach, there certainly is an affirmative
22 claim for breach in the objection to our
23 claim. Paragraph 24, for example, but there
24 are many other instances. The claim says --
25 the objection to claim says, "WorldCom

1 provided notice to HSG of its breach." And
2 then proceeds to explain why, under the
3 contract, they don't have any further
4 commission obligation that's a claim for
5 breach. It may not have been asserted as an
6 adversary proceeding, but the breach of
7 contract issue is there front and center. I
8 disagree with Mr. Tucci's reading of the
9 contract, we'll get to that on the other
10 motion. Mr. Tucci says, on the topic of
11 damages, he says that with regard to the
12 September 25, 2002 solicitation, that's not
13 time barred. Because there's no evidence in
14 the record as to when WorldCom sustained
15 damages as a result of that solicitation and
16 that's when the statute of limitations should
17 begin to accrue. Well, in connection with the
18 claim proceeding, on July 1, WorldCom's
19 witness testified that with respect to both
20 episodes of solicitation that are potentially
21 at issue here, there was no discernible change
22 at all in WorldCom's revenue stream from what
23 it could perceive. So there are no damages,
24 that is a complete red herring. If there are
25 damages, WorldCom knows what they are and when

1 they were accrued. So really it should be
2 WorldCom who's telling you, here's when the
3 damages accrued and that's why the claim is
4 timely. They're not telling you that, they're
5 just saying there's nothing in the record
6 about damages. But there is from the claim
7 proceeding.

8 THE COURT: Let's proceed to the
9 next motion.

10 MR. TUCCI: Thank you, Your Honor.
11 This is WorldCom's motion and bear with me, I
12 am going to go a little bit farther into the
13 facts here because they're important to
14 understanding the debtor's motion for summary
15 judgment. The agreement at issue here was an
16 agreement whereby HSG obtained customers,
17 telecom services customers for WorldCom. Then
18 was paid a commission on a continuing basis to
19 do that. The parties entered into this
20 contract approximately four years prior to the
21 bankruptcy filing. And front and center in
22 the contract, in at least three places, there
23 is an express prohibition on HSG soliciting
24 the customers if procured for WorldCom. And
25 there were specific consequences for that

1 solicitation. Under paragraph 8.1 of the
2 agreement, "for as long as WorldCom pays
3 representative commissions in accordance with
4 Exhibit B, representative agrees," that's HSG,
5 "that representative will not contact any
6 customers for the purpose of inducing them to
7 switch to another provider or any service
8 which competes with the services of defined
9 term." 8.3 under the agreement,
10 "representative agrees that if representative
11 does so contact a customer -- a WorldCom group
12 customer, WorldCom will give representative
13 five days prior written notice at the end of
14 which period WorldCom's obligation to pay
15 representative any commissions not yet earned
16 under this agreement will cease." Now, HSG
17 became somewhat nervous, apparently, when it
18 read reports that WorldCom was contemplating a
19 bankruptcy, a reorganization. And about a
20 month before that it sent a letter, which it
21 was entitled to do under the agreement,
22 terminating the agreement. What that allowed
23 HSG to do was no longer be an exclusive seller
24 of WorldCom services, it could out and market
25 other telecom service providers to other

1 customers because, obviously, we had the
2 prohibition on contacting these customers. So
3 it sent a letter to MCI WorldCom and on August
4 6th, MCI WorldCom responded stating that they
5 have accepted the termination effective as of
6 July 28th, 2002, which was 30 days after the
7 notice was sent. And then it followed, "this
8 letter is a reminder that during this post-
9 termination period ATN", which is another name
10 for HSG, "is required to comply with the
11 provisions of section 8.1 and section 13 of
12 the agreement." And it went on to say, "that
13 ATN is required not to contact any MCI
14 WorldCom or TTI customers procured under the
15 agreement or under any other agreement between
16 ATN and WorldCom for the purposes of inducing
17 such customers to switch to another provider
18 of similar services." Approximately a month
19 later, ATN sends a letter to one of its
20 customers saying "as you know, ATN's been
21 taking care of your phone services since June
22 because of the uncertain future of TTI
23 National which is wholly owned by bankrupt
24 WorldCom. We would like to switch your
25 account to another provider that we are now,"

1 I can't read it, it's a bad fax, "utilizing,"
2 I believe. "We strongly recommend your
3 allowing us to transition your account to DNG.
4 You will save about five percent over TTI, but
5 the bigger concern is that TTI WorldCom may
6 not survive the bankruptcy. There could be
7 service disruptions and other problems. DNG
8 would accept your account without additional
9 credit checks." That was in September, a
10 month after MCI WorldCom warned HSG not to
11 solicit any of its customers. WorldCom found
12 out about that and wrote, on November 14th, to
13 HSG. The beginning sentence of the letter is
14 "With this letter, MCI WorldCom
15 Communications, successor in interest to
16 WorldCom Technologies, gives notice to HSG/ATN
17 that ATN has acted in violation of section 8.1
18 of the representation agreement dated August
19 4, 1998." What was HSG's response to that?
20 Their response was to engage in a massive
21 solicitation campaign involving 152,000
22 WorldCom customers that they had procured on
23 behalf of WorldCom and so solicit them to
24 switch service providers. WorldCom had
25 already notified HSG that it was in violation

1 of the agreement. When it found out about the
2 152,000 what did it do? Its counsel, at that
3 time Weil Gotshal, sent a letter saying
4 "you're in violation of the automatic stay,
5 these customers are property of the estate,
6 stop it right now." What did HSG do, this is
7 somewhat of an aside, Your Honor, but once
8 they got that letter they switched from
9 soliciting the customers to soliciting the
10 agents. And then January and February of
11 2003, they solicited approximately 14,000
12 agents of MCI, which was also prohibited under
13 the terms of the agreement. MCI told HSG, at
14 this time, it was no longer getting any money
15 from MCI, which it had been paying all of the
16 post-petition amounts that we were talking
17 about under the 549 claim up to that point.
18 It told them it was going to reject the
19 contract and it told them it was in violation
20 of the automatic stay. None of that is in
21 dispute. All of that happened, there's not a
22 scintilla of evidence before this Court that
23 that is factually inaccurate. The only issue
24 is what effect does that conduct have. Under
25 the express terms of the agreement, WorldCom's

1 obligation to pay the future commissions
2 ceased. There is no dispute that that's what
3 the agreement says. So we have no genuine
4 issue of any material fact with respect to the
5 facts of solicitation or what the agreement
6 says about solicitation. HSG throws up
7 several arguments to try and get out of this
8 summary judgment, is basically where we are.
9 The first argument they said well, the notice
10 on November 14th wasn't good enough because it
11 happened with respect to the September
12 solicitation not the other 152,000
13 solicitations. Well, that's just absurd.
14 There was no requirement to renotify them.
15 The solicitation occurring was a violation of
16 the agreement, HSG was notified of the
17 violation of the agreement; five days
18 thereafter WorldCom's obligation to pay
19 ceased. In effect, HSG had a choice. And to
20 kind of paraphrase Yogi Berra, they went to
21 the fork in the road and they took it. They
22 could have gone to the left side which was
23 leave the MCI customers alone and continue
24 collecting the residual commissions, or they
25 could go the right side and solicit the MCI

1 customers and forego the commissions. They
2 are trying to do both. They solicited 100 --
3 at least 152,001 customers and they're trying
4 to collect the commissions at the same time.
5 Because they're saying, if I'm understanding
6 Mr. Fisher correctly, well, it wasn't very
7 successful solicitation so we shouldn't have
8 to forego, we shouldn't have to live up to the
9 terms of the contract. Now, in its brief HSG
10 has said WorldCom is judicially estopped from
11 making this argument because it didn't make
12 this argument when it defended the
13 administrative priority. Judicial estoppel
14 simply does not apply in this instance. And
15 the reason it doesn't apply is because
16 WorldCom took no position with respect to
17 whether the commissions were ultimately owed
18 in the administrative proceeding. All it did
19 was defend the administrative proceeding under
20 503. It didn't engage in a discussion at that
21 time nor would it have been appropriate to,
22 that the claim was in of itself improper. As
23 a matter of fact, HSG hadn't even filed a
24 claim at that point in time, it filed a claim
25 in November -- excuse me, in October, I

1 believe it was of 2004. It's also said well,
2 wait a minute, you can't give us -- you can't
3 give WorldCom summary judgment because we
4 haven't had an opportunity to engage in
5 discovery. So it's raised this Rule 56(f)
6 defense that it should be either denied or
7 delayed, the summary judgment. And to that,
8 and we say this in our papers, in order to
9 prevail on this type of 56(f) defense, if you
10 will, you have to come forward and say what
11 those facts are and why they would have
12 mattered. As I stated earlier, here we have
13 undisputed facts of solicitation and an
14 undisputed consequence of that solicitation
15 under the terms of the agreement. There
16 aren't any facts that are out there that shed
17 light on that. It's an unambiguous
18 solicitation and it's an unambiguous
19 agreement. The agreement speaks for itself.
20 And the sort of final group of defenses that
21 HSG raises are related to enforceability of
22 the agreement. Well, number one, when they
23 answered the adversary proceeding and all this
24 is laid out in the adversary proceeding and
25 the objection to the amended claim, they never

1 once said that the agreement was
2 unenforceable, and it's an affirmative
3 defense. So they waived it, number one.
4 Number two, they don't come forward. The
5 burden is on them to come forward with facts
6 showing that the agreement is either void,
7 violates public policy or is unconscionable.
8 And as we set forth in the brief, agreements
9 just like this are routinely upheld,
10 especially under the employee choice doctrine,
11 which is -- there are many decisions under the
12 employee choice doctrine in the Second Circuit
13 which, quite frankly, recognize the choice
14 that HSG had to make here. Continue
15 collecting the commissions and respect the
16 terms of the agreement or forego the
17 commissions and violate the agreement. An
18 entity -- a sophisticated entity such as HSG
19 or a sophisticated employee is viewed as
20 making an intelligent choice when faced with
21 that type of situation. And for all those
22 reasons, Your Honor, we believe that summary
23 judgment on this claim should be granted
24 denying it.

25 MR. FISHER: Your Honor, I'd like to

1 really just go to the heart of the matter.
2 And I think the heart of the matter is did the
3 letter that WorldCom sent on November 14,
4 2002, after they learned of this September 25,
5 2002 single incident of solicitation, did that
6 cut off their obligation to pay residual
7 commissions. And I think that it is very
8 clear that it did not. At a minimum, there
9 are very serious factual issues here that need
10 to be explored before one conclusion can be
11 made one way or the other. And I want to
12 highlight, again, that there have been no --
13 despite the fact that I sent deposition
14 notices in October and November, despite the
15 fact that I put document requests out there in
16 August and have been pressing for documents
17 and depositions ever since, we haven't gotten
18 the discovery that we're entitled to. But
19 going right to the heart of the matter, the
20 November 14, 2002 letter, Mr. Tucci read to
21 you the first part of it, but it concludes by
22 saying, one, "ATN should immediately cease
23 sending letters to or contacting in any way
24 any MCI WorldCom or TTI National customers
25 procured under the agreement." If section

1 8.1, which is the non-solicitation provision,
2 if WorldCom was terminating its residual
3 commission obligation, then ATN was no longer
4 prohibited from soliciting. What WorldCom did
5 is they decided, notwithstanding the fact that
6 they had learned of the solicitation, they
7 didn't want to let HSG off of the hook. They
8 wanted to maintain the ability to keep HSG
9 from soliciting. And, so as a result, they
10 continued to pay residual commissions. That
11 was under the circumstances of the time when
12 WorldCom was dealing with a whole mess from
13 their agents, a strategic choice. Actually,
14 their counsel referred to it as business
15 judgment when he made closing argument in the
16 administrative claim proceeding. They then
17 say "MCI WorldCom is considering what steps to
18 take to protect MCI WorldCom's rights
19 including, but not limited to, ceasing payment
20 to ATN of any commissions not yet earned under
21 the agreement pursuant to section 8.3 of the
22 agreement." So, obviously, I concede that
23 this is an authentic letter and I concede that
24 Mr. Reynolds of WorldCom told my client that
25 WorldCom was considering whether to cut off

1 residual commissions, but they ultimately did
2 not. And I should point out that this letter,
3 it's signed by Kirk Reynolds, it's cc'd to Mr.
4 Lako, Mr. Ahern and Mr. Hampton. There are
5 deposition notices outstanding for all four of
6 them. There are document requests even the
7 files of all four of those individuals and we
8 don't have it yet. Now, I think that there's
9 more compelling evidence in the record as to
10 why that November 14th letter is not notice of
11 termination of the residual commission
12 obligation. And all this evidence could be
13 found as exhibits to the Batten declaration
14 that we submitted in connection with our
15 opposition. One, a WorldCom witness testified
16 before Your Honor that, with regard to the
17 November 14th letter, "rather than separate
18 this agent," that's the quote they decided not
19 to separate the agent, WorldCom decided to
20 send a, "strong reminder, letting them know
21 that we're aware of the activities." This is
22 a strong reminder letter. It's not a letter
23 cutting off commissions. Then WorldCom's
24 counsel, in closing, argued, Your Honor, it
25 was a business judgment whether they acted

1 correctly in not terminating the contract or
2 taking some other avenue. Effectively,
3 WorldCom's counsel conceded that they decided,
4 at the time, not to terminate the contract.
5 That was their business judgment. WorldCom
6 sends an e-mail on December 17, 2002, to my
7 client. WorldCom has made a determination to
8 reject your residual commission obligations.
9 This is what they say in December 17, 2002.
10 By then they know of both episodes of
11 solicitation. "WorldCom has made a
12 determination to reject your residual
13 commission obligations as part of its
14 management of the bankruptcy process. We
15 regret the impact on your company, but can
16 assure you that you have the right to file a
17 claim against the company as part of the
18 bankruptcy claims process." This was not a
19 foreign e-mail, this was an e-mail from Mr.
20 Lako, with whom my client had been dealing
21 regularly, that begins, dear George. This was
22 not an oversight. WorldCom had made a
23 decision to reject. Then on January 3, 2003,
24 they filed a motion seeking to reject the
25 contract -- the residual commission

1 obligation. If they're filing a motion to
2 reject, why are they filing a motion to reject
3 if it's WorldCom's view that they had already
4 terminated that obligation due to
5 solicitation? Plainly, they had not. And I
6 think that that's really where the heart of
7 our estoppel argument is. Your Honor granted
8 the motion to reject. In effect, by bringing
9 the motion to reject, WorldCom admitted that
10 as of January 3, 2003, when they made the
11 motion, the contract was still in existence,
12 the residual commission obligation was still
13 in existence. So those are really, I think,
14 the more salient facts that we rely on to say
15 that this letter, the November 14, 2002
16 letter, was not notice of termination. And,
17 you know, counsel used the expression that
18 WorldCom came to a fork -- that HSG came to a
19 fork in the road and that they decided to go
20 both ways. Well, actually, I think that
21 that's exactly what WorldCom has done here.
22 They learned of HSG's solicitation and they
23 had a decision. Do we terminate residual
24 commissions, thus freeing up HSG to solicit,
25 or do we just live with it and send them

1 strong reminder letters because we want to
2 have the leverage to continue to keep them
3 from soliciting. And they decided to send the
4 strong reminder letter, that's a choice that
5 they made. I do think that one way through
6 the thicket for Your Honor is simply our 56(f)
7 argument. We put in a very detailed
8 declaration specifying exactly what it is that
9 we're trying to get to the bottom of and
10 exactly what discovery we've been denied. And
11 finally, Your Honor, with regard to the
12 enforceability of this nonsolicitation
13 provision and the -- really what we're
14 challenging is -- we're challenging it as an
15 unenforceable liquidated damages provision
16 because, what we know here as a matter of
17 fact, we know that with respect to the two
18 instances of solicitation, WorldCom's witness
19 said, and this is highlighted in our brief,
20 said that there was no change in WorldCom's
21 revenue stream. So we know that there were no
22 damages to WorldCom. And we also know, if you
23 just credit WorldCom's expert report, that if
24 we're entitled to residual commissions they're
25 in the amount of 5.4 million dollars. Now, we

1 would be an unsecured creditor, so ultimately,
2 we would get approximately 30 percent of that.
3 But it is a very substantial claim and
4 WorldCom is seeking to have us forfeit all of
5 it for solicitation that they decided never to
6 act on and that they concede did not have any
7 real impact on their revenue stream. So we
8 think that's what makes it an unenforceable
9 liquidated damages provision. HSG has been
10 described as a sophisticated company. My
11 clients, in certain respects, are
12 sophisticated. But at the end of the day it's
13 a father/son company. It is a small company
14 and I do not think that they had any leverage
15 whatsoever and if the discovery proceeds we'll
16 be able to show this. When it came to
17 negotiating the terms of this representation
18 agreement, there's a limitation of damages
19 provision that applies to WorldCom. There's
20 no limitation of damages that applies to my
21 client. So WorldCom had enormous leverage
22 here, they're seeking to have this family
23 company forfeit a very sizeable commission
24 based on conduct that WorldCom has conceded
25 had no impact on their revenue stream, and

1 even more to the point, based on conduct that
2 WorldCom decided not to act upon and not to
3 terminate the residual commission obligations
4 for their own strategic reasons.

5 THE COURT: All right, before you
6 sit down, let me -- and your point has been
7 made clear, but let me just try to understand.
8 If, as you suggest, I believe you suggest,
9 that WorldCom never terminated the agreement
10 pursuant to the contract and the only thing
11 WorldCom, in your view, ultimately did was
12 reject it, which would then be treated as a
13 breach of the agreement relieving the other
14 side from performance under the agreement that
15 the ability of WorldCom to say that you can't
16 get, or any of your accrued commissions should
17 be disallowed, would not be triggered because
18 there was never a termination. So you're left
19 with a rejected contract with the damages that
20 then flow from a rejected contract. What
21 then, in your view, defenses would WorldCom
22 have? You're saying that the defense that you
23 solicited in violation of the contract doesn't
24 really get them anywhere because their
25 obligation then was to terminate, and since

1 they didn't terminate that solicitation would
2 be limited to what, establish damages?

3 MR. FISHER: Correct, Your Honor.

4 THE COURT: It would be the only
5 offset?

6 MR. FISHER: And that's exactly the
7 ground where our experts disagree, how do you
8 cal -- because there's a certain projection
9 that's involved here. WorldCom, as I
10 mentioned, continues to earn very substantial
11 revenue from customers that HSG brought to it.
12 So our experts disagree about how do you
13 project into the future when that revenue
14 stream will ultimately trail off, such that
15 residual commissions stop accruing. Their
16 expert comes to a number of 5.4 million and
17 our expert, depending on which attrition rate
18 he used, says we need some more discovery but
19 the claim is between 5.1 million and 9
20 million. And I think that ultimately that's
21 where this dispute should be. It should be a
22 dispute about what are the damages as a result
23 of the rejection, exactly as Your Honor
24 indicated.

25 THE COURT: All right. The debtor.

1 MR. TUCCI: Very briefly, Your
2 Honor. There are a couple of facts that we
3 need to make sure are very straight here.
4 Number one, the agreement has been terminated.
5 As you might recall, I read the letter
6 accepting the termination that was sent by HSG
7 in the summer of 2002. The agreement was
8 terminated effective July 28, 2002. All that
9 remained was the continuing obligation to pay
10 residual commissions and the continuing
11 obligation not to solicit the customers and
12 the agents. That is what was rejected. We
13 can have an academic discussion on what that
14 means in the grand scheme of things, but
15 termination, notice of termination, all of
16 that is meaningless. The agreement was
17 terminated. All the agreement required
18 WorldCom to do was give notice of a violation
19 of that section 8.1, the nonsolicitation
20 provision. It gave that notice on November
21 14, 2002. It was received, it was
22 unambiguous, it says "hereby gives notice to
23 HSG/ATN that ATN has acted in violation of
24 section 8.1." Under the terms of the
25 agreement, once that notice was given,

1 WorldCom's obligation to make further residual
2 commission payments ceased five days after
3 that. That's it, that's the facts. One other
4 thing that we need --

5 THE COURT: So what was its conduct
6 then, thereafter continuing to pay the
7 residuals?

8 MR. TUCCI: I'm sorry?

9 THE COURT: I mean, how do you
10 explain this conduct thereafter, when it
11 continued to pay them?

12 MR. TUCCI: It didn't. Let's get
13 the dates straight here. It made a payment on
14 September 15th, that was for the period
15 petitioned to the end of July. It made a
16 payment on October 15th that was for August.
17 It made a payment on November 12th or so, that
18 was for September. This letter is dated
19 November 14th, two days later. It never made
20 another payment after that. It told them it
21 wasn't making any payments, it rejected the
22 agreement; it wrote them a letter and said
23 they were violating the automatic stay.

24 THE COURT: Well, you're merging a
25 number of events into one particular letter, I

1 think, and one date. On November 14th, what
2 did -- how do you construe that as a notice of
3 termination?

4 MR. TUCCI: It's a notice of
5 violation of section 8.1 of the agreement.
6 And under 8.3 of the agreement, once the
7 notice of violation is given, WorldCom's
8 obligation ceases five days after that.

9 THE COURT: Did the letter infer
10 that it wasn't then going to pay any more
11 commissions? I mean, what did the letter say
12 about commissions?

13 MR. TUCCI: Well, it said it was
14 considering what steps to take to protect its
15 rights. And what steps it took was, stop
16 paying the commissions, noticed that it was
17 rejecting the contract, sent a letter that HSG
18 had violated the automatic stay and there is
19 e-mail correspondence saying we're rejecting
20 this contract, we're not paying you anymore.

21 THE COURT: What do you need to
22 reject a terminated contract?

23 MR. TUCCI: Well, it's an
24 interesting question.

25 THE COURT: Well, it is interesting,

1 but I think the burden may very well lie with
2 WorldCom to explain.

3 MR. TUCCI: I think at the time, and
4 again, the dates here are critical, this
5 letter is dated November 14. This massive
6 solicitation occurred somewhere from mid-
7 November to mid-December. And, with
8 everything that was going on, there were
9 152,000 solicitations that occurred in this
10 approximately 30 day period. And one of the
11 reactions was, let's not pay them anymore,
12 let's reject the contract. And that's what
13 happened.

14 THE COURT: If the contract was
15 terminated, what rights did they have to
16 solicit thereafter that? The contract, in
17 your view, is terminated by this notice on
18 November 14th.

19 MR. TUCCI: No, the contract was
20 terminated by the notice in August of 2002.
21 The contract specifically provided that it
22 could be terminated by either party. But some
23 of the obligations survived termination. One
24 of the obligations was WorldCom's obligation
25 to continue paying residual commissions

1 conditioned upon HSG's continuing obligation
2 not to solicit agents and customers. So there
3 were -- the agreement itself had been
4 terminated. There were some continuing
5 obligations that required both parties to do
6 certain things. Not to solicit by HSG and to
7 make payments by MCI.

8 THE COURT: But on November 14, if
9 WorldCom says that they're considering their
10 remedies which would be, I'm giving you notice
11 of a violation of the section that said you
12 can't solicit WorldCom's customers. What is
13 that supposed to mean to HSG? Does that mean
14 that you're not going to get commissions
15 anymore? And if it means you're not going to
16 get commissions anymore, what were then the
17 continuing obligations that HSG had?

18 MR. TUCCI: If they were not getting
19 commissions anymore for subject to their
20 rights in bankruptcy because they weren't
21 getting paid commissions on a post-petition
22 dollar for dollar basis. That's clear.
23 Whether they had the opportunity to present a
24 claim, I think they would have some continuing
25 obligations to not solicit. But at that point

1 in time, if they're not getting paid or --
2 take it outside the context of bankruptcy, if
3 WorldCom breaches and doesn't pay, they have
4 no obligation to not solicit any longer.

5 THE COURT: All right, thank you.

6 MR. TUCCI: Thank you.

7 MR. FISHER: Thank you.

8 THE COURT: All right.

9 MR. FISHER: Your Honor, I'm sorry.

10 Just before we wrap up, as part of our
11 opposition to the motion, we also ask that
12 today's oral argument be treated as a pre-
13 motion discovery conference. And in
14 particular, all I seek is the Court's
15 permission to bring a motion to compel the
16 depositions and the documents that I highlight
17 in my 56(f) declaration as being essential and
18 that have not been provided to date.

19 THE COURT: Well, that may be a bit
20 premature. I mean, I -- let me determine what
21 direction I'm going in first before I rule on
22 that. All right. Chambers will contact you.
23 If you haven't heard from chambers in 30 days
24 I could set up a conference call with
25 chambers.

1 MR. FISHER: Thank you, Your Honor.

2 MR. TUCCI: Thank you.

3 THE COURT: All right, thank you.

4 (Proceedings concluded at 12:00 P.M.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

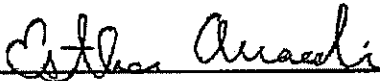
25

C E R T I F I C A T I O N

I, Esther Accardi, hereby certify that
the foregoing is a true and correct
transcription, to the best of my ability, of
the sound recorded proceedings submitted for
transcription in the matter of:
WorldCom, Inc., et al.

I further certify that I am not employed
by nor related to any party to this action.

In witness whereof, I hereby sign this
date:
May 9, 2006



Esther Accardi